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The price of truth in the Polish civil proceedings. Comparative comments de lege lata and de lege ferenda on illegal evidence

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SUMMARY
The main problem discussed in the article is the issue of illegal evidence in the Polish civil proceedings, discussed by the way of comparison with solutions adopted on the ground of criminal and administrative law. The purpose is to point both the procedural and non-procedural consequences of using such evidence, it's significance for the conclusion of the court and the consequent, potential responsibility of the person using it during the trial. The author reviews many judgements of the Polish Supreme Court and appellate courts, illustrating the analysis of the selected civil, administrative and criminal regulations. His conclusion is the unfavorable opinion concerning the lack of regulations openly regarding the question of the illegal evidence in the Polish Code of Civil Proceedings. According to the author, it is crucial to add such adjustments, closing the discussed codification to its administrative and criminal counterparts.

Key words: illegal evidence, Code of Civil Proceedings

PRELIMINARY CONSIDERATIONS

Court controversies predominantly comprise controversies over the facts. The subject of the proceedings is to determine the facts, to clarify "what happened", to reveal the course of action and its participants. Court proceedings predominantly involve a fight over the evidence. It is an absolute fight, on the grounds of both civil and criminal proceedings. Initially, at the times of the inquisitorial legal

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system based on the principle „*confessio est regina probationum*", in order to obtain testimony, even torture was applied and nobody considered principles that would regulate the ways of obtaining evidence for the sake of the protection of the legal order, human rights or privacy.

The pursuit of objective truth is immanently related to interference with the privacy of the participants in the proceedings, to interference with the sphere of their rights. The conflict of values, such as objective truth and widely understood privacy and the protection of the legal order, is permanent. In many cases its consequence is an alternative – either you refuse to protect privacy and respect the legal order (including the protection of particularly precious social values) and thus are able to determine objective truth or you respect the legal order and privacy and thereby resign from the pursuit of the truth.

Legislators in different countries and legal systems solve this conflict in different ways. The Polish legislator regulates it differently on the grounds of civil, criminal or administrative proceedings. The legislator, guided by the hierarchy of values it has adopted, in consideration of the mutual relationship of burden of the conflicting values (objective truth vs. the legal order and personal rights) may in different ways prevent the addressees of legal norms from obtaining the evidence unlawfully – either by ignoring the evidence obtained in an illegal way or by admitting it under certain conditions, in both cases, however, providing for proper sanctions against the persons who obtained the evidence unlawfully or who use such evidence.

Below, I will submit for analysis the provisions of Polish civil proceedings concerning the issue of illegal evidence and I will consider as a reference the solutions adopted on the grounds of criminal and administrative proceedings. I will indicate the procedural consequences of offering illegal evidence (the question of whether such evidence may be admitted in given proceedings) and non-procedural consequences with respect to a subject offering such evidence (the issue of responsibility for obtaining the evidence in an illegal way) and I will present my suggestions *de lege ferenda*.

ILLEGAL EVIDENCE

The notion of "illegal evidence" needs to be specified here because it may be understood in many different ways and may refer to the issue of breaches of procedural law and substantive law as well as to the issue of obtaining evidence while breaching the law or the principles of community life and ethical standards.

I share the view of M. Krakowiak[1] that a uniform notion of illegal evidence, which includes evidence obtained with a breach of law as well as the principles of community life, needs to be adopted. There are, however, also other views – such as, for example, the view presented by W. Nartowski,[2] according to which the notion of inadmissible evidence should also be specified. Its meaning is broader than the notion of illegal evidence. According to the mentioned author, illegal evidence is evidence obtained in an unlawful way, be it a breach of criminal, administrative or civil law – substantive or procedural law (therefore, it not only applies to evidence taken against the evidentiary prohibitions provided for in the code of civil proceedings[3] /hereinafter CCP/) – so the illegal evidence might be, for example, a stolen document or photograph, photomontage, letters as well as hard copies of e-mail messages, conversations by instant messaging or SMSs obtained without the consent of the interested person.

Inadmissible evidence, on the other hand, also includes evidence obtained in such a way that goes against the principles of community life or ethical standards.

The distinction between illegal evidence (taken by breaching the law) and inadmissible evidence (taken in such a way that goes against the principles of community life and ethical standards) seems to be grounded only in a theoretical, academic aspect with no practical significance. It would make sense to identify a category of inadmissible evidence, where the incompatibility with the principles of community life or ethical standards was an independent basis for assigning negative procedural effects to such evidence, whereas the principles of community life or ethical standards may be indicated as a criterion for evaluation only as long as the norms of positive law refer to them. On the grounds of civil substantive law, this does not generate any doubts – it concerns the general clause of the principles of community life provided for in Article 5 of the Civil Code as a criterion for evaluation of the abuse of law. However, the provision of Article 4^1 CCP[4] which introduces the concept of the abuse of law to civil proceedings does not refer directly to the principles of community life. Admittedly, as is commonly believed[5], the purpose of the

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1 M. Krakowiak, *Potajemne nagranie na taśmę jako dowód w postępowaniu cywilnym*, MoP 2005, nr 24, s. 1251.

2 W. Nartowski, *Drzewo zatrute, owoc niekoniecznie,* Rzeczpospolita z 17.10.2011r., https://adwokaci-nt.pl/drzewo-zatrute-owoc-niekoniecznie/ data dostępu 12.03.2020.

3 Kodeks postępowania cywilnego z dnia 17 listopada 1964 r. (Dz.U. Nr 43, poz. 296) tj. z dnia 19 lipca 2019 r. (Dz.U. z 2019 r. poz. 1460).

4 Dodany ustawą z dnia 4 lipca 2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz.U. z 2019 r. poz. 1469).

5 Por. P. Feliga, uwagi do art. 4^1, [w:] *Kodeks postępowania cywilnego. Tom I-II. Komentarz do art. 1-1217*, T. Szanciło (red.), Warszawa 2019.

introduced provision is to "make the proceedings moral"[6], but it does not indicate directly the principles of community life in the same way as Article 5 CC does.

The wording of Article 4^1 CCP[7] allows one to defend the view that while evaluating the issue of the abuse of procedural law, a functional aspect should primarily be taken into account. Such a view is in line with the view of Ł. Błaszczak[8] who – when determining the essence of the abuse of procedural law – referred to the purpose of the existence of a given institution of the procedural civil law. He claims that the evaluation, where a given act constitutes the abuse of procedural law, should therefore be based on the determination of the purpose which the party intends to achieve when carrying out the given act and on the evaluation of whether such a purpose is justified in the light of the procedural destination of the given institution. In other words, it should be established whether the purpose of the actions of the party *in concreto* is in line with the purpose of the procedural institution *in abstracto*. Within such an interpretation, the means by which the party wanted to achieve the intended purpose would be less important. Moreover, the reference to the principles of community life as a criterion for evaluation of the abuse of procedural law is also questionable due to the systemic interpretation of the provisions of the Code of Civil Proceedings. The principles of community life appear as a criterion for evaluation in the Code of Civil Proceedings with reference to the precisely specified institutions – Article 183^{14} § 3 and Article 184 (admissibility of a settlement agreement); Article 203 § 4 (admissibility of the withdrawal of the statement of claim); Article 213 § 2 (the court is bound by the admission of a claim); Article 622 § 2 (unanimous cancellation of co-ownership). Except for these cases, there is no explicit basis for referring to the principles of community life; however, in the general provisions of the Code of Civil Proceedings there is a reference to a different general clause – good practice (Article 3 CCP). Of course, one may consider a mutual relationship between the clause on the principles of community life and the clause concerning good practice and the possibility of really identifying them[9]. However, the current wording of the legal provisions makes it difficult anyway, within the current legal position, to defend the view on the legitimacy of making the distinction between inadmissible evidence which is in violation of the principles of community life, ethical standards or any other non-legal criterion.

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6 Termin „moralizacja procesu" został zaczerpnięty od R. de Pina, *La moralizzasion del processo*, s. 184, 183, cyt. za K. Piasecki, *Nadużycie praw procesowych przez strony*, „Palestra" 1960/11 (35), s. 20-28.

7 Z uprawnienia przewidzianego w przepisach postępowania stronom i uczestnikom postępowania nie wolno czynić użytku niezgodnego z celem, dla którego je ustanowiono (nadużycie prawa procesowego).

8 Ł. Błaszczak, *Nadużycie prawa procesowego w postępowaniu arbitrażowym*, Warszawa 2018, s. 5.

9 M. Sala-Szczypiński, *Zasadność zmiany klauzuli „zasady współżycia społecznego"*, „Studia prawnicze. Rozprawy Materiały. Acta Academiae Modrevianae", s. 65 i nast.

Furthermore, it needs to be emphasized that among the doctrine statements the dominant view is the view according to which the possibility of applying directly the legal provisions set forth in Article 3 CCP in order to deprive a procedural act carried out in civil proceedings "contrary to good practice" of effectiveness, needs to be excluded. In other words, the provision of Article 3 CCP itself may not constitute for a court the basis for rejecting or considering as ineffective a procedural act of a party due to the fact that it is deemed an abuse of law. This provision rather has the character of a legislative postulate with no sanctions[10]. Such a categorical view of the doctrine is mitigated by court rulings where the courts state that the obligation – set forth in Article 3 CCP – to carry out acts in line with good practice is not combined with any general sanctions; but they also indicate that if a party does not perform such an obligation, they should take into account possible unfavorable procedural effects because the court may take such a situation into consideration while taking procedural decisions[11].

The literature presents a view whereby the meaning of the notion of the abuse of procedural law under Article 4^1 CCP fits within the meaning of the clause of good practice under Article 3 CCP. The mutual connection between these notions is supposed to lead to the conclusion that between their meanings there is a relationship of primacy of the meaning of the notion of good practice over the meaning of the notion of the abuse of procedural law. This means that each case of the abuse of procedural law by a party or a participant in the proceedings violates good practice, though not every act carried out by a party or participant in the proceedings which violates good practice constitutes an abuse of procedural law[12]. In particular, there is – in my opinion – no basis for stating that taking the evidence in a way that violates good practice constitutes an abuse of procedural law.

The legislator considered *de lege lata* as an abuse of procedural law: the submission of a motion to disqualify a judge based only on the facts connected with the decision issued by the court on the evidence (Article 53^1 § 1 point 1 CCP) or a new motion filed with respect to the same judge based on the same facts (Article 53^1 § 1 point 2 CCP); the submission of a motion to appoint an advocate or a legal advisor based on the same facts as the motion previously rejected (Article 117^2 § 2 phrase 1 CCP); the submission of a pleading filed as a statement of claim which does not include a request to solve the controversy with the character of a civil case; the submission of a motion to correct a judgment, to supplement a judgment

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[10] Ł. Błaszczak, *Klauzula generalna „dobrych obyczajów" z art. 3 k.p.c.*, „Polski Proces Cywilny" 2014, nr 2, s. 171.

[11] Por. uchwała SN z 11.12.2013 r., III CZP 78/13, OSNC 2014, Nr 9, poz. 87.

[12] Por. P. Feliga, *op. cit.*

and to interpret a judgment only to delay the proceedings (Article 350^1 § 1, Article 350^1 § 4 in connection with § 1 CCP); the submission of a complaint only to delay the proceedings (Article 394^3 § 1 CCP). In each of the above-mentioned cases, the purpose which a party wants to achieve when carrying out a given act is not in line with the procedural destination of the given institution. Such an accusation may not be posed against a party which presents the illegal evidence in order to present the facts of the case. Therefore, it may not be stated that the presentation of illegal evidence which enables clarification of the facts of the case constitutes an abuse of the law. The basis for rejecting such evidence needs to be searched for elsewhere.

The illegal evidence may be divided into evidence which is directly or indirectly illegal. Such a distinction is the basis of the concept of "fruit of the poisonous tree". The notion of "fruit of the poisonous tree" refers to the distinction between evidence which is directly illegal (obtained by a breach of the law) and evidence which is indirectly illegal (this is evidence obtained legally but as a result of the illegal possession of information about its existence). Evidence which is indirectly illegal is exactly this „fruit of the poisonous tree", although this metaphoric notion is often colloquially and imprecisely used with reference to illegal evidence in general, without a distinction made between evidence which is directly or indirectly illegal. More specifically, the notion of *fruit of the poisonous tree* refers to the effects of an illegal or inadmissible action of a given subject in court proceedings. "The tree" is the direct evidence "poisoned" by an action of the subject and "the fruit" is the further evidence obtained in such a way.

The concept of the fruit of the poisonous tree, created in American law[13], was initially intended to protect civil rights against the excessive, illegal intervention of the public investigation authorities. In practice, however, particularly within civil proceedings, but not only, the illegal evidence is offered by entities of private law which are parties or the aggrieved party which obtained such evidence on their own or through private investigation companies. The most banal examples are evidence taken illegally to prove the economic espionage of an employee or to prove adultery. The above considerations need, therefore, to be relativized and referred to private persons.

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[13] Po raz pierwszy pojęcia *fruit of the posionous tree* w odniesieniu do prawa karnego użyto w 1939 r. w sporze „Nardonne vs. USA", por. P. Laidler, *ANALIZA: Trujące owoce zatrutego drzewa*, http://www.instytutobywatelski.pl/24992/publikacje/analizy/spoleczenstwo-analizy/analiza-trujace-owoce-zatrutego-drzewa.

K. Gajda-Roszczynialska makes a distinction between illegal evidence in its broad and narrow interpretations[14]. In the broadest interpretation, the notion of illegal evidence refers to taking the evidence with a breach of substantive law (criminal, civil, administrative) or civil procedural law (in this case it is about the violation of prohibitions on evidence) and in the narrow interpretation it refers to taking the evidence against substantive law. The author also differentiates between evidence presented against the law (procedural law) and the evidence taken against the law (substantive law). The second distinction is particularly useful and we will refer to it in the further part of our considerations because only the consequences of the presentation of the evidence against procedural law are directly regulated in the Code of Civil Proceedings.

COMPARATIVE LEGAL COMMENTS

III.I. ADMINISTRATIVE LAW

The issue of illegal evidence is also present and essential in administrative law, provided that the legislator is, in this case, very unambiguous.

Pursuant to the Code of Administrative Proceedings[15] (hereinafter: CAP) „Anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence. In particular, documents, witness testimony, expert opinions and inspections may constitute evidence." (Article 75 § 1). Therefore, in administrative proceedings only the means which are not in violation of the law may be admitted as evidence. This means that the evidence may not be incompliant with substantive law or with certain evidence limitations provided for under the procedural law[16]. The violation of the law is here understood very broadly, that is why, for example, the information obtained from a person who under Article 82 CAP is incapable of being a witness may not be admitted as evidence which may contribute to determining the facts which are significant for the matter[17].

The notion of „compliance with the law" of the admissibility of evidence needs to be interpreted in the light of the regulation under the provisions of substantive

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[14] K. Gajda-Roszczynialska, *Ograniczenia dopuszczalności dowodów nielegalnych w postępowaniu cywilnym: granica czy fundament dążenia do prawdy w postępowaniu cywilnym?* „Polski Proces Cywilny 2016, nr 3, s. 393-406.

[15] Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego (Dz.U. z 2020 r. poz. 256).

[16] F. Elżanowski, [w:] *Kodeks postępowania administracyjnego. Komentarz*, wyd. 6, R. Hauser, M. Wierzbowski (red.), Warszawa 2020.

[17] Por. R. Kędziora, uwagi do art. 75, [w:] *Kodeks postępowania administracyjnego. Komentarz*, wyd. 5, Warszawa 2017.

law, taking into account the entire regulation which indicates the hypothetical facts of the case with respect to a given case.

To illustrate this thesis, it is worth referring to two court rulings, without limiting ourselves – which is important – to their theses. The rulings are only apparently contradictory (if you only familiarize yourself superficially with the theses). However, if you read the entire groundings and familiarize yourself in detail with the facts, you will admit their relevance. Also, the comparison of these rulings reveals the risk of limitation in legal argumentation to quoting only the thesis of rulings or their fragments to support one's statements without taking into consideration the entire grounding. That is a trap which one may easily lay for oneself.

According to the judgement of 7 March 2013, II OSK 2119/11 issued by the Supreme Administrative Court „The admission by adjudicating authorities in a case as evidence of information concerning the fact that the complainant committed offences which are spent was compliant with the law".

On the other hand, in the judgement of 22 October 1981(I SA 2067/81, ONSA 1981, Nr 2, item 103) the Supreme Administrative Court stated that „evidence of recidivism may only be a valid excerpt from the register of convictions (punishments). It is, however, unacceptable – under Article 75 CAP with respect to Article 110 of the Criminal Code and Article 46 § 1 of the Act of 20 May 1971 – the Code of Petty Offences – to treat the rulings as evidence".

Only apparently are these rulings contradictory. In fact, they refer to issues which are completely different from the admissibility as evidence of a judgement under which the adjudicated punishment was spent.

In the first case, a substantive issue was subject to evaluation – does the person applying for a gun licence guarantee that it will be used lawfully and safely? Such a circumstance may have been proved with reference to a court ruling which was spent. Indeed, we need to consider as relevant the view presented by the court under which the spent conviction is not an impediment to determining under Article 75 CAP that the gun owner committed an act which itself or in connection with other circumstances generates fear that such a person will use the gun for purposes contradictory to the interest of public order. The spent conviction is based on the fiction whereby a determined person – due to the lapse of time – is deemed as a person with no criminal record. The validity of the above-mentioned principle does not prevent an administrative authority from carrying out a full and objective evaluation of the properties and personal conditions of the convict within which the authority will also take into account the fact that the party to the proceedings was the committer of an offence which became spent. On the other hand, in the second case, the subject of evaluation was a question of whether the

person who was a party to the proceedings on the withdrawal of a driving license by a local unit of public administration due to numerous violations by the driver of the provisions on the prohibition on driving motor vehicles in a state indicating the consumption of alcohol or similar agent committed a determined act in conditions of recidivism. In such a case, the authority may not treat the judgements (rulings) as unconditional evidence. Such evidence may only be a valid excerpt from the register of convictions (punishments) because the administrative authority can't be familiar with the proceedings in the course of which the conviction became previously spent under a request of the convict.

Legal provisions almost identical to those in the Code of Administrative Proceedings (with the exception of the sample enumeration) were adopted by the legislator in the Tax Ordinance Act[18] – „Anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence" (Article 180 § 1).

The Supreme Administrative Court, on the grounds of these provisions, stated (v. the judgement of 7 February 2019, I FSK 1860/17) that if under Article 180 § 1 of the Tax Ordinance Act anything that may contribute to clarifying the matter and is not in violation of the law needs to be admitted as evidence, it is therefore necessary that the tax authorities verify whether the evidence taken as a result of the application of operational techniques (i.e. bugging) was taken in line with the formal requisites under separate provisions and above all whether a determined operational technique was adopted in the cases where such a technique could have been adopted and whether it was carried out under the supervision of an ordinary court. The court stated that the tax authorities, when receiving the evidence, for example, the bugged conversations, taken by other authorities must on their own evaluate its legality, i.e. if it was taken under the binding provisions and under the supervision of the court.

An unambiguous principle under which the illegal evidence is excluded is included in the act – The Entrepreneurs' Law[19] of 6 March 2018 (Journal of Laws of 2018, item 646), i.e. of 11 June 2019 (Journal of Laws of 2019, item 1292). Under Article 46 section 3 the evidence produced in the course of the inspection conducted by an inspection authority in breach of the provisions of the Act or other provisions of law governing the inspection of the entrepreneur's economic activity may not, if they had a significant impact on the inspection results, constitute

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[18] Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa (Dz.U. z 2019 r. poz. 900).

[19] Ustawa z dnia 6 marca 2018 r – Prawo przedsiębiorców (Dz.U. z 2019 r. poz. 1292).

evidence in any administrative, tax, penal or fiscal-penal proceedings concerning the entrepreneur.

The presented legal provisions of administrative law may not be directly copied in the civil law as they have a different function and there is a different relationship between the parties to the proceedings. The principle of subordination to an administrative authority and inequality of a party with respect to the administrative authority make the main purpose of the provisions concerning the illegal evidence on the grounds of the administrative law be the protection of the parties to the administrative proceedings against the lawlessness of the authorities. The legislator unequivocally granted priority to the principle of legalism and respect for the citizens' rights. Let us remember, however, that the principles of exclusion of the illegal evidence will also be applied in cases where there are parties with contradictory interests and offering different evidence to the authorities. However, even in such cases, there is no contradictory procedure typical for the civil law.

III.II. CRIMINAL LAW

Until 1 July 2015 in the criminal proceedings there were no binding provisions concerning the use in the proceedings of evidence obtained illegally. On this day the provision of Article 168a of the Code of Criminal Procedure entered into force, which states that the *evidence shall not be treated as inadmissible exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 of the Criminal Code.* The court rulings issued under this provision were not unambiguous. The Supreme Court, in its judgement of 2 February 2016 (IV KK 346/14, Biul.PK 2016/1-3/79-88), stated that even after having introduced the above provision into Polish criminal proceedings the principle of freedom to adduce evidence is still binding and in the evidentiary proceedings it is still acceptable to carry out any evidentiary acts except for acts which are explicitly banned.

According to the Supreme Court, Article 168a of the Code of Criminal Proceedings in the wording specified by the Act of 27 September 2013 on the modification of the act – the Code of Criminal Proceedings and some other acts, Journal of Laws of 2013, item 1247 did not introduce the prohibition from using „*the fruit of the poisonous tree*" because it only referred to the prohibition against taking and using evidence which was directly illegal. On 16 April 2016 there was an amendment to Article 168a of the Code of Criminal Proceedings. According to its new wording **„***Evidence shall not be treated as inadmissible exclusively due to the fact that it was gained in violation of procedural law or by commission of a prohibited act referred to in Article 1 § 1 of the Criminal Code, unless it was gained by a public*

official in connection with the performance of his duties as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom". Thereby, the legislator generally admitted the possibility of using the illegal evidence, except for cases explicitly indicated in the provision, i.e. when the evidence was gained in connection with the performance by a public official of his duties as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom.

In the doctrine of criminal law[20] the author expresses the hope that the provision of Article 168a (in its modified wording) proves that the legislator took into account the postulates concerning the necessity to maintain in the criminal proceedings the instruments which limit the freedom – in particular of private entities – to gain evidence and to determine the facts of the case on the basis of illegal evidence. The new Article 168a of the Code of Criminal Proceedings constitutes an expression of a compromise between two contradictory tendencies, i.e. on the one hand, a tendency to exclude entirely and on the other hand, to admit entirely that evidence may be gained with a breach of the act. This provision constitutes a principle of general admissibility of evidence gained with a prohibited act, except for a situation where such evidence is gained in connection with the performance by a public official of his duties or where such evidence is gained as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom. The prohibition of evidence set forth in this provision refers only to illegal evidence, if the illegality of its gaining is connected with two kinds of circumstances: 1) the acts of a public official in connection with the performance of his duties or 2) as a result of manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom.

In practice, it only involves the admissibility of so called private evidence, i.e. information gained, commissioned or generated by the participants of the proceedings which are not the procedural authorities or broadly understood investigation authorities, on the condition that such entities are not public officials who gain the evidence in connection with the performance of their duties and that the acts of such entities did not lead to manslaughter, wilful commission of a grievous bodily injury or deprivation of freedom.

It means that the court needs to consider as admissible, for example, private evidence which is a recording made as a result of phone-tapping. The gaining of evidence through a prohibited act does not include other behaviours generally

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[20] D. Gruszecka, uwagi do art. 168a, [w:] *Kodeks postępowania karnego. Komentarz*, J. Skorupka (red.), Warszawa 2020.

prohibited by the law – for example, civil law, administrative delicts, constitutional delicts, disciplinary torts or petty offences.

However, it needs to be emphasised that the interpretation of Article 168a of the Criminal Code generates a great deal of doubt and is not unambiguous[21]. Without analysing the doubts presented in the doctrine which are generated, above all by the words *exclusively* used in the provision and the consequences of the prohibition on the broad interpretation of the exceptions (*exceptiones non sunt extendendae*) with respect to the question of breaches of the constitutional rights of an individual, let's point out that on the grounds of the criminal law the legislator decided (in a more or less competent way) to specify the categories of inadmissible evidence.

ILLEGAL EVIDENCE IN CIVIL PROCEEDINGS

In civil proceedings the issue of illegal evidence generates considerable doubts and consequently a great deal of interest in the doctrine[22]. This is due to the fact that there are no clear legal provisions which would impede the use of such evidence. The Code of Civil Proceedings does not include any regulation concerning the issue of admissibility of such evidence or its legal definition – the issue of illegal evidence on the grounds of civil proceedings is, therefore, different from the grounds of criminal or administrative proceedings.

Of course, the above does not imply the full freedom to use illegal evidence. Its inadmissibility may indirectly result from the provisions of substantive law as well as from the provisions of procedural law. However, the fact that there is no direct provision which explicitly and precisely determines the issue of admissibility of illegal evidence gives way to discussions and argumentations which, above all, need to take into consideration the functions and purposes of civil proceedings, the situation of the parties as well as the nature and importance of values violated through the illegal gaining of evidence.

In the doctrine there are a lot of definitions of the functions and purposes of civil proceedings[23], provided that some authors distinguishes the functions (of a dynamic nature, including the actions) from the purposes (stative – the intended state of affairs to be achieved), whereas others deem these notions as practically identical. In the second group of authors there is S. Włodyka, according to whom

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[21] Por. K. Lipiński, *Klauzula uadekwatniająca przesłanki niedopuszczalności dowodu w postępowaniu karnym (art. 168a k.p.k.)*, „Prokuratura i Prawo" 2016, nr 11, s. 44-59.

[22] Por. *Dowody w postępowaniu cywilnym*, Ł. Błaszczak, K. Markiewicz, E. Rudkowska-Ząbczyk (red.), Warszawa 2010.

[23] Szerzej na temat celu i funkcji postępowania cywilnego por. R. Kulski, *Cel i funkcje postępowania cywilnego*, [w:] *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego*, K. Markiewicz, A. Torbus (red.), Warszawa 2014, s. 443-481.

the functions of civil proceedings are general; the intended social effects of the civil proceedings are evaluated from the perspective of the kind of social needs which are satisfied by such proceedings. S. Włodyka specifies the protective functions (a social effect which involves the granting of proper legal protection to determined social values – concerning either the individual or general interest) and other functions. The other functions involve the generation of other social effects, e.g. an effect which involves the organization of social relationships (organizational functions) or an educative effect (educative functions)[24].

The authors who distinguish the purpose state that such purpose is to issue a judgement (more broadly: the settlement of a civil case), provided that the issued solution be rightful, correct, fair and accurate[25].

The mentioned functions and purposes are important as they may disqualify the illegal evidence or, on the contrary, encourage its use, depending on which value we deem as a priority.

Two different views may be distinguished here.

According to the first view, illegal evidence may be admitted as evidence in a case and a decision whether to admit such evidence in a given situation is at the free discretion of the court and, possibly, the person who gained such evidence may be liable on the grounds of civil and criminal law. With respect to this view it may be assumed that, for example, the recording of conversations is not unlawful as a breach of the personal goods of the recorded person because it was an action intended to protect a fair private interest. Moreover, it performs the constitutional right for the court granted under Article 45 section 1 of the Constitution of the Republic of Poland under which everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

According to the opposite view, evidence gained in an unlawful way should not be admitted, even if the person who gained it acts to protect their fair private interest because such an interest will always be a considerably less important value than goods such as the protection of privacy and confidentiality of communication of the person whose goods were violated. Thereby, it may be stated that within the legal order binding in Poland the courts may not without prejudice to the administration of justice rely on evidence gained unlawfully because in this way the entire proceedings cease to be accurate.

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[24] S. Włodyka, *Pojęcie postępowania cywilnego, jego rodzaje*, [w:] *Wstęp do systemu prawa procesowego cywilnego*, J. Jodłowski (red.), Ossolineum 1974, s. 282.

[25] Por. A. Skorupka, *Dopuszczalność dowodu sprzecznego z prawem w sądowym postępowaniu cywilnym*, Warszawa 2018, s. 235 i nast. oraz cytowana tam literatura.

The court rulings concerning the admissibility of illegal evidence is not unambiguous and the briefest illustration of this state of affairs is a judgement issued by the Appellate Court in Szczecin[26] in which the court confirmed that „at this moment, when the civil proceedings do not determine the issue under discussion, it is impossible to assume the principle of unlimited freedom to use in the proceedings evidence gained via a breach of the Constitution, conventions or civil law nor the principle of an unconditioned and total prohibition on the use of such evidence". The Code of Civil Proceedings does not include any provisions concerning the issue of admissibility of such evidence or its legal definition[27].

Considered the fact that sound recording devices are very often used and such evidence is frequently offered in court proceedings, the question of admissibility of recordings made in secret is often discussed in court rulings. While analyzing this question, we need to pay attention to the following issues, which are also referred to in court rulings, and thus we cannot treat this question homogeneously.

Firstly, we need to distinguish a recording made by a person participating in the conversation and a recording made by a person who is not one of the interlocutors. In the literature, while emphasizing serious doubts concerning, on the one hand, the admissibility in the provisions on civil proceedings of the possibility of taking the evidence from recordings (Article 308 CCP) and, on the other hand, the necessity to respect the constitutionally protected right to privacy and the confidentiality of communication, much attention is paid to the necessity to distinguish the evaluation of admissibility of evidence from recordings acquired illegally, with a breach of Article 267 of the Criminal Code, which determines the offence of illegal access to information and evidence which does not constitute this offence as it is a recording of a conversation in which the recording person participates and therefore, it records information acquired legally. In the second case, the limitations on the admissibility to use the recording may result from the nature of its content, concerning the privacy of the recorded person.

Secondly, we need to distinguish a general issue of admissibility of this category of evidence from the evaluation of reliability of the determined evidence. Whereas the doubts pointed out in the literature concerning the value of evidence from a secretly recorded conversation between the recording person and an interlocutor due to the fact that the recording person may control the course of the conversation do not justify disqualification of the evidence a priori. Only the taken evidence may be evaluated in terms of the evidentiary value of its content, including the effect on

[26] Zob. wyrok Sądu Apelacyjnego w Szczecinie, I Wydział Cywilny z 9.10.2014 r., I ACa 432/14.
[27] Zob. wyrok Sądu Apelacyjnego w Krakowie, I Wydział Cywilny z 20.08.2015 r., I ACa 257/15.

the formulated statements of possible provocations or suggestions applied during the conversation by the recording person. Also, it needs to be evaluated whether the recording includes the entire statements of the interlocutors; whether the recording maintains continuity; and whether it is possible to establish that the recording is faithful and authentic which usually requires the professional assistance of experts.

Bearing in mind these reservations, we may quote a few representative court rulings.

The Supreme Court, in a judgement of 23 April 2003 (IV CKN 94/01), admitted that a party may present evidence gained illegally. According to the Supreme Court, in proceedings on the termination of marriage by divorce, for the purposes of determining who is guilty of the breakdown of the shared life, tape recordings of conversations between the parties, even if such recordings were made without either of them being aware of it, may be used. Also, according to the Appellate Court of Poznań (the judgement of the Appellate Court of Poznań – the First Civil Division of 23 January 2013, I ACa 1142/12) „there are no grounded reasons for disqualification of evidence from recorded phone conversations, even if such recordings were made without one of the interlocutors being aware of it".

According to the Appellate Court of Białystok (the judgement of the Appellate Court of Białystok – the First Civil Division of 31 December 2012, I ACa 504/11) „it is admissible to take evidence from recordings made personally by persons being parties who as the participants in the conversation do not breach the provisions protecting the privacy of communication (Article 49 of the Constitution)". In the grounding of this judgment, the court specified that the principle of inadmissibility to take illegal evidence binding on the grounds of civil procedural law does not have a general character. This principle does not include evidence such as recordings made personally by the participants in the events which are later on presented to the court by these persons being parties. It was emphasized in this context that the persons who make such recordings, unlike third parties, due to the fact that they participate in the communication process, do not breach the provisions protecting the privacy of communication provided for in Article 49 of the Constitution, whereas in the case of other rights of an absolute character (personal goods, right to privacy), freedoms and rights provided for in Articles 49 and 51 of the Constitution, the fact that these goods are not unlawfully breached is due to the performance of the right to court. The right to court provided for in Article 45 of the Constitution as well as the provisions of the statute specifying the court civil proceedings allow one to breach the mentioned goods in consideration of the subject of the proceedings which was submitted by a party for the court's evaluation and the performance of the protection of their legal rights in civil proceedings.

In the judgement of 13 November 2002 the Supreme Court pointed to the protection of the reasonable private interest as a condition which may disqualify the illegality of the breach of personal goods which involves the making and use of a secret recording of a conversation (I CKN 1150/00). According to the court, the disqualification of illegality would in turn enable it to take evidence from such a recording.

While in the judgement issued by the Appellate Court of Białystok on 31 December 2012, I ACa 504/11, it was pointed out that no accusation may be leveled against a person who as a participant in the conversation records the statements of the persons participating in this event that their action is contrary to the law, at most to good practice and that it is admissible to take evidence from recordings made personally by the persons acting as parties who, as participants in the conversation, do not breach the provisions protecting the privacy of communication and in the case of breach of other rights of an absolute character (personal goods, right to privacy), the lack of illegality results from the performance of the right to court.

On the other hand, in the judgement of 22 April 2016 (II CSK 478/15) the Supreme Court stated that if the recorded persons authorize the use of a secretly made recording for evidentiary purposes before a civil court, it usually removes the obstacle which is an illegally gained recording. However, should there be no such authorization, the court needs to evaluate whether the evidence – considering its content and the way it was gained – does not breach the constitutionally guaranteed (Article 47 of the Constitution) right to privacy of the recorded person and if so, whether the breach of this right may be grounded by the need to assure to another person the right to a fair hearing of their case (Article 45 of the Constitution). However, the doubts concerning the value of evidence from a secretly recorded conversation between the recording person and an interlocutor, due to the fact that the recording person may control the course of the conversation, do not justify disqualification of the evidence a priori. The court also unambiguously stated that in civil proceedings it is inadmissible to take evidence from recordings gained illegally via a breach of Article 267 of the Criminal Code but it is not disqualified to use evidence which is not a result of the offence of recording a conversation in which the recording person participates.

The Supreme Court, in the ruling of 24 September 2010, IV CSK 87/10, stated that the freedom of communication is one of the consequences of broadly understood civil and personal liberties which include all forms of communication between people, whereas the privacy of correspondence is a much narrower notion connected above all with the right of each person to the respect of their private life and their right to maintain as confidential the content of the message addressed

to other persons or institutions, provided that the illegality of an action is not disqualified by the circumstance that the bugging and recording of a conversation were supposed to protect a private interest in civil proceedings because the right to defense may not be performed in a way which is secret, devious, contrary to the principles of community life and with a breach of personal goods. For these purposes, the fundamental meaning would also have the provisions of the Constitution, in particular the provision of Article 49, which indicates the constitutional liberty, freedom and protection of privacy of communication with respect to Article 31 section 3 of the Constitution which specifies that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons.

Also, the judgement of the Appellate Court of Warsaw (the judgement of 6 July 1999, I ACa 380/99) was compliant with the aforementioned arguments. The court stated thereby that "the right to the freedom of speech, choice of an interlocutor, privacy of the conversation is a commonly respected right. The illegality of the action by the defendant is not disqualified by the circumstance that bugging and recording of the petitioner's conversations were supposed to defend the defendant in divorce proceedings." The court indicated that the right to defense in court proceedings may not be performed in a devious way, contrary to the principles of community life.

The judgement of the District Court of Nowy Sącz (the judgement of 18 December 2013, III Ca 566/13) may be a summary of the presented views. According to the judgement, „in principle, evidence gained in an unlawful way should not be admitted in civil proceedings and an exception to this principle should be justified by the existence of special circumstances of the determined case which in one case may be the grounds to give priority to pursuing the hearing of the case in line with the substantive truth, whereas in other cases to give priority to the right to protection of the privacy of communication."

FINAL CONSIDERATIONS

In the current legal status in Polish civil proceedings, there is no definition of illegal evidence or unambiguously and explicitly determined circumstances for admitting it or the consequences of its presentation. The presented court rulings are not unambiguous either, moreover, they are excessively relativized with respect to the circumstances of the determined case.

I am convinced that it is reasonable to introduce to the Code of Civil Proceedings provisions concerning illegal evidence, as is the case with criminal and administrative law.

As I mentioned at the beginning, the pursuit of objective truth is immanently related to interference with the privacy of the participants in the proceedings, to interference with the sphere of their rights. The legislator should determine the principles of preference in the case of a collision between such values as, on the one hand, the objective truth and on the other hand, the broadly understood protection of legal order. These principles of preference should be determined with the full awareness of social consequences of the absolute protection of the selected values to the prejudice of finding out the truth, in the context of a protective and educational function of civil proceedings. When formulating such a norm, social perception of court judicature cannot be forgotten. Disqualification of the evidence essential in the case which might prevail in favor of one party or another because it was illegally gained may generate serious sense of harm and injustice. In my view, the statute should disqualify illegal evidence gained via a breach of human health and life (like the Code of Criminal Proceedings does). The statutory norm would play a preventive role and eliminate a temptation to gain the evidence by way of offences against selected goods (and it would protect health and life unconditionally) – the unambiguous court rulings do not play such a role.

The postulated norm *de facto* would determine the title "price of truth" in a general aspect, i.e. how far the legislator is ready to tolerate a breach of the legal order in order to determine the substantive truth in court proceedings. The price of truth in an individual aspect is and would still be the liability for a criminal act or a civil tort as a result of which the evidence was gained, i.e. in most cases the criminal liability for a breach of the provisions concerning the protection of information (Article 267 of the Criminal Code) and the civil liability for a breach of personal goods such as privacy or confidentiality of correspondence

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Marcin Sala-Szczypiński

Cena prawdy w polskim postępowaniu cywilnym. Uwagi porównawcze *de lege lata* i *de lege ferenda* w przedmiocie nielegalnych dowodów

STRESZCZENIE

Głównym problemem podnoszonym w treści artykułu jest kwestia nielegalnych dowodów w polskim postępowaniu cywilnym, omawianych w zestawieniu z rozwiązaniami przyjętymi na gruncie prawa karnego i administracyjnego. Służy to wskazaniu zarówno procesowych, jak i pozaprocesowych konsekwencji wykorzystania takiego dowodu, co ma znaczenie zarówno dla treści rozstrzygnięcia sądu, jak i wynikającej z takiego zachowania potencjalnej odpowiedzialności osoby używającej go podczas procesu. Autor dokonuje przeglądu licznych orzeczeń polskiego Sądu Najwyższego i sądów apelacyjnych, ilustrując nimi analizę wybranych przepisów cywilnych, administracyjnych i karnych. Jego konkluzją jest niekorzystna opinia dotycząca braku przepisów otwarcie odnoszących się do kwestii nielegalnych dowodów w polskim kodeksie postępowania cywilnego. Według autora bardzo ważne jest dokonanie korekt normatywnych, które zbliżą w tym zakresie omawianą kodyfikację do jej administracyjnych i karnych odpowiedników.

Słowa kluczowe: nielegalne dowody, Kodeks postępowania cywilnego